

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW JERSEY**

**BEAUTY REACTIONS, LLC,**

**Plaintiffs,**

**v.**

**ORACLE AMERICA, INC, et al,**

**Defendants.**

**CIVIL ACTION NUMBER:**

**3:18-cv-09222-BRM-TJB**

**ORAL ARGUMENT**

Clarkson S. Fisher Building & U.S. Courthouse  
402 East State Street  
Trenton, New Jersey 08608  
August 23, 2018  
Commencing at 10:19 a.m.

**B E F O R E:**

**THE HONORABLE BRIAN R. MARTINOTTI,  
UNITED STATES DISTRICT JUDGE**

**A P P E A R A N C E S:**

ROBBINS & ROBBINS  
BY: SPENCER B. ROBBINS, ESQUIRE  
568 Amboy Avenue  
Woodbridge, NJ 07095  
For the Plaintiff

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
BY: ROBERT S. FRIEDMAN, ESQUIRE  
30 Rockefeller Plaza  
New York, NY 10112  
For the Defendant

Certified as true and correct as required by Title 28 U.S.C.  
Section 753

/S/ MEGAN MCKAY-SOULE, RMR, CRR

Megan McKay-Soule, Official Court Reporter  
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1 THE DEPUTY COURT CLERK: All rise.

2 (Open court begins at 10:19 a.m.)

3 THE COURT: Welcome, counsel. Good morning. Your  
4 appearances for the record, please.

5 MR. ROBBINS: Spencer Robbins of Robbins & Robbins  
6 representing the plaintiff, Beauty Reactions.

7 MR. FRIEDMAN: Robert Friedman, Sheppard, Mullin,  
8 Richter & Hampton, LLP for defendants. Good morning, Your  
9 Honor.

10 THE COURT: Good morning. Okay. Thank you. You can  
11 be seated.

12 I have read all the papers. I'm going to give a little  
13 overview and then I'll hear some arguments from counsel.

14 Before this Court is defendant Oracle America, Inc. and  
15 NetSuite, Inc.'s -- I'm going to refer to them collectively as  
16 defendants -- motion to dismiss plaintiff Beauty Reactions  
17 L.L.C.'s complaint for, 1, failure to abide by contractual  
18 conditions precedent; or, 2, to transfer venue pursuant to 28  
19 U.S.C. 1404; or, 3, to dismiss pursuant to Federal Rule of  
20 Civil Procedure 12(b)(6).

21 The motion, Document No. 5, was filed on May 21st,  
22 2018. On 5 June 2018, the plaintiff filed a certification in  
23 opposition, Docket No. 7. Despite defendant's assertion that  
24 the certification is defective and should be disregarded, the  
25 Court has considered same.

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1 Defendant replied on 11 June 2018, Document No. 9. At  
2 that time the matter was fully briefed, and on 19 July 2018  
3 the court scheduled oral argument.

4 As an initial matter, this Court finds it does have  
5 jurisdiction. Defendants are corporations, and as defendant  
6 points out in their brief, all that is relevant is their state  
7 of incorporation and principal places of business, 28 U.S.C.  
8 1332 (c) (1), "Deeming a corporation to be a citizen of the  
9 state by which it has been incorporated and/or the state or  
10 foreign state in which it has principal place of business."

11 Plaintiffs referenced Oracle doing business in New  
12 Jersey. As defendant argues, and the Court agrees, is closer  
13 to an argument that the Court can exercise general or specific  
14 jurisdiction over Oracle, which is not the subject of Oracle's  
15 motion. Nevertheless, because defendants are not citizens of  
16 New Jersey under 28 U.S.C. 1332, plaintiff, a citizen of New  
17 Jersey under that statute, the parties are citizens of  
18 different states and therefore there is diversity.

19 As defendant argues, plaintiff's contention that the  
20 amount in dispute is \$75,000 is erroneous. Defendant  
21 correctly points out 28 U.S.C. 1332(a), which states that,  
22 quote, "District courts shall have original jurisdiction over  
23 all civil actions where the matter in controversy exceeds the  
24 sum or value of \$75,000." Citing to *Venuto, V-E-N-U-T-O, v.*  
25 *Atlantis Motor Group, L.L.C.*, No. CV173363RBKKMW, 2017 Westlaw

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1 4570283 at 2, District of New Jersey, October 2017.

2 Plaintiff's complaint asserts four causes of actions  
3 against defendants. Specifically, 1. Breach of contract. 2.  
4 Fraud. 3. Violation of the New Jersey Consumer Fraud Act.  
5 4. Breach of warranty of merchantability. The complaint, as  
6 defendant argues, is devoid of any allegations as to specific  
7 amount or amounts in damages associated with those claims and  
8 certainly does not claim that the amount sought is less than  
9 the jurisdictional minimum. "Because the complaint is silent  
10 or ambiguous as to one or more of the ingredients needed to  
11 calculate the amount of controversy, the defendant's notice of  
12 removal serves the same function as the complaint would if the  
13 suit was filed in federal court." *Frederico v. Home Depot*,  
14 507 F.3d 188, 3d Cir. 2007.

15 The Court finds that the facts are relatively straight  
16 forward. Plaintiff's business involves the sale of various  
17 beauty products, including hair dryers, curlers, liquid  
18 products and other products to certain companies. Since the  
19 beginning of the business it has been using several computer  
20 programs. It came to a point that it sought to increase the  
21 abilities of its computers. Mr. Mayo, principal of the  
22 company, interviewed several companies, including meeting with  
23 individuals from NetSuite. Plaintiff agreed to utilize the  
24 services, thinking he was getting, quote, "the Silver support  
25 status." Defendant states that they entered into a

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1 Subscription Services Agreement, hereinafter referred to as  
2 SSA, dated April 27, 2017, under which defendants offered the  
3 plaintiff a subscription service for certain NetSuite  
4 business application software in return for certain defined  
5 fees.

6 Section 5 of the SSA titled Terms of Service,  
7 hereinafter referred to as TOS, expressly incorporates the  
8 term of service as the term of an SSA, citing to Friedman  
9 declaration, which is Exhibit A, Section 5, Term of Service.  
10 The customer acknowledges and agrees and has read and  
11 understands and agrees to be bound by the main terms of  
12 service.

13 The cost of the program was \$631,000, approximately.  
14 There was an agreed upon discount of \$372,000, approximately.  
15 Therefore, the cost would be approximately \$258,000.

16 There are additional costs for certain hardware that  
17 the plaintiff was required to purchase for the software to  
18 operate. Mr. Mayo contends there were many representations  
19 about the programs and the services. Plaintiff admits that an  
20 agreement was entered into. There was an initial payment of  
21 \$55,436.23. In addition, plaintiff spent another 19,000 to  
22 purchase hardware.

23 Ultimately, the program did not meet plaintiff's  
24 expectations. An inquiry was made on how to cancel the  
25 contract, which ultimately led to plaintiff filing a lawsuit

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1 in Middlesex County, removed to this court.

2 The defendant then moved for the relief set forth  
3 previously by the Court on the record.

4 Counsel, this is your application. I'll hear you, but  
5 the question I have is if I were to grant one of your  
6 alternatives, does that then moot the remainder of the  
7 alternatives? Wherever you're comfortable, counselor.

8 MR. FRIEDMAN: Thank you, Your Honor.

9 So if I understand your question correctly, Your Honor,  
10 if you grant the 1404 motion, should you address the 12(b)(6)  
11 motion?

12 THE COURT: Right.

13 MR. FRIEDMAN: Yes. Okay.

14 That is within Your Honor's discretion. I believe at  
15 this point that the proper -- the proper procedural mechanism  
16 would be to transfer first, and then we would be litigating  
17 this in California and submit the motion to dismiss under  
18 12(b)(6).

19 THE COURT: How about the clause requiring, I guess,  
20 a conference, the mediation?

21 MR. FRIEDMAN: The mediation, yes. Well, that would  
22 come before anything, and I agree with you. If you were to  
23 grant the motion to dismiss and dismiss this case because the  
24 prerequisite was not met, then I believe that that would be  
25 first, the transfer would be second, and the 12(b)(6) would be

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1 third, if we had to view it in a linear fashion.

2 THE COURT: Okay.

3 MR. FRIEDMAN: I do -- you do have discretion now  
4 that you've exercised jurisdiction to grant the 12(b)(6)  
5 motion as well. And it would seem to me the most -- that  
6 would be the most logical progression.

7 THE COURT: So talk to me about the failure to follow  
8 the dispute resolution contained in the TOS incorporated into  
9 the Subscription Services Agreement.

10 MR. FRIEDMAN: Yes. So the TOS was not an executed  
11 document, but as Your Honor identified, under Section 5 it is  
12 specifically incorporated. There is a mandatory mediation  
13 provision in the Terms of Service.

14 THE COURT: It's actually before you even get to  
15 mediation, there's an obligation to try to resolve it among  
16 yourselves.

17 MR. FRIEDMAN: Yes. Now, the reason I'm focusing on  
18 mediation is there is -- I believe there is -- we have not  
19 been able to find the same certainty in the authority with  
20 respect to the more informal dispute resolution, so a meeting  
21 of executives, as is typical in these contracts. So, for  
22 example, if the parties have to sit down, escalate it, discuss  
23 it, those are common in these kind of contracts. There is not  
24 the same authority with respect to the mandatory nature of  
25 that. So that's why we've really focused more on the

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1 mediation aspect, because as the Court knows, there is a -- a  
2 deference to alternate dispute resolution and that is a  
3 prerequisite. The cases that we've cited, mainly the one from  
4 Florida, for example, which are persuasive authority, have  
5 dismissed cases in these similar situations.

6 THE COURT: I'll hear your argument.

7 MR. FRIEDMAN: Yeah. So that is -- our argument is  
8 essentially the -- based upon the authority that we cite,  
9 including the 3-J Hospital case and the language in the Terms  
10 of Service specifically incorporated, very simply there  
11 was a -- there was an alternative dispute resolution that the  
12 parties have agreed to prior to the initiation of any lawsuit.  
13 There is not an arbitration provision, but there is a  
14 mediation provision, and the authority that we cited,  
15 including 3-J Hospital case, treat those the same. This is a  
16 prerequisite that should have been instituted prior to the  
17 initiation of any lawsuit.

18 THE COURT: Okay. Let me hear from plaintiff's  
19 counsel. Talk to me about the contract that incorporates the  
20 TOS.

21 MR. ROBBINS: Your Honor, this jumps off with a  
22 simple idea of trying to redress the damage that's been done  
23 to my client. He enters into a contract without counsel with  
24 regard to it, and the terms -- or the print in which the  
25 redress is outlined is so small it's difficult to read and



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1 hard to even understand.

2 He entered into the contract with regard to it based  
3 upon a number of things that they had requested, meaning they  
4 had not only expectations because they already had computer  
5 programs, they already had a few things, so they wanted to  
6 upgrade it. So now the idea was to get something  
7 sophisticated that can run his business and a number of  
8 businesses that he had.

9 He has a number of staff, in fact, that have come today  
10 with regard to it to go over any issues. But not only  
11 couldn't they do what they said they could do, they've also  
12 then, after going through a number of different things,  
13 meaning going back and forth over a six-month period of time  
14 to try to get everything, they couldn't even do the simplest  
15 thing of even writing a check and keeping inventory on this  
16 computer program that was supposed to be as sophisticated as  
17 anything that's ever been existing.

18 There have been communications back and forth that it  
19 just doesn't work, and they agreed that it didn't work. The  
20 final portion of the redress that they were seeking, they went  
21 back to the individuals who are located I think mostly in  
22 Massachusetts, not in California, stated that there is no  
23 refund policy, there's nothing that we can do and we can't get  
24 to there. As they say -- what's the expression? The dog  
25 won't hunt. He can't get it to work.

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1           So they've tried to figure out what it is. There's  
2 correspondence going back, e-mails with regard to it with Miss  
3 Bantassel suggesting that, you know, is there something?  
4 There's nothing that can get them there even for the basic  
5 things of keeping inventory, which is substantial for them,  
6 and writing checks. So as a result of that, we commenced  
7 suit.

8           We tried to find out what's the refund policy, we tried  
9 to find out. They said there isn't anything with regard to  
10 it. There was nothing mentioned that they could do anything  
11 more. They've, in fact, monitored the programs that they have  
12 forwarded to show that we have not used them, aren't able to  
13 use them. And so the idea landed that there is a contract,  
14 but nobody was aware at the time that there would be a  
15 limitation as to where the suit could be brought or how the  
16 procedure would have been.

17           So the case was started in state court in Middlesex  
18 because they're located there and because the -- Oracle does  
19 have five offices located here. Am I aware of what their  
20 profit making or what they can do or where they are? No, but  
21 I represent some Oracle employees that are here so I know that  
22 they're in New Jersey.

23           So that was what we sought to do. The matter -- I  
24 think the total amount -- we paid 55. The contract was for  
25 200 and something thousand. We paid another 20, \$30,000 for

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1 equipment, so we seek redress. The idea is that we --

2 THE COURT: Not relevant to the motion presently  
3 before the Court, what's the status of the contract? Have  
4 payments still been made? Did they stop paying?

5 MR. FRIEDMAN: No. They paid the 55,000, they paid  
6 for the equipment. Nothing further happened. No request for  
7 any money was even made by Oracle or NetSuite. So there's not  
8 a demand that you owe us money that we're going to do this.  
9 We filed the suit because we asked for the refund policy, we  
10 asked what they're going to do with regard to it, and they  
11 couldn't fix it, couldn't make us the programs that they said  
12 they would. And so they've done nothing with regard to it.

13 So approximately six, eight months go by without any  
14 communication from them, no demand from them, and so I  
15 commenced a lawsuit with regard to it because it was clear  
16 that there was no refund policy, nothing to suggest that we  
17 have a meeting to try to get the money back or where it's  
18 going to go. So my redress was to file suit.

19 THE COURT: Understood. But you acknowledge that the  
20 contract -- and I heard what you said earlier, unrepresented,  
21 signs a contract.

22 MR. ROBBINS: Yes. So I think that the language with  
23 regard to it, to have the matter heard in California when  
24 everybody is here in New Jersey. This is a forum non  
25 conveniens argument also because nobody in California is aware

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1 of this contract or did anything with the contract. The  
2 people that came down and worked on the contract were from  
3 Massachusetts or New Jersey. They weren't from California.  
4 Payments weren't made, I don't think, to California. It was  
5 made, in fact, to New Jersey and Massachusetts. So that's why  
6 we commenced the action here.

7           The amount of money that we were seeking with regard to  
8 it with all -- everything was just above the amount, so that's  
9 why I filed it in the state court because I believed that  
10 would be the proper address because I didn't think there was  
11 diversity of citizenship. I understand the corporation is in  
12 California, its main headquarters, but they seem to operate in  
13 every state. And if you even Google them, there are five  
14 offices here in New Jersey. So --

15           THE COURT: Well, I think that gets more into  
16 jurisdiction rather than citizenship.

17           MR. ROBBINS: Uh-huh.

18           THE COURT: So that's an issue, and the Court has  
19 already determined that this Court does have jurisdiction.

20           Talk to me about the forum selection clause.

21           MR. ROBBINS: Well, they have suggested or they have  
22 laid out in their contract that it would be in San Jose,  
23 California. That's, I gather, where their corporate  
24 headquarters are or that's where the county would be. It's,  
25 first of all, not convenient because all the witnesses for

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1 Beauty Reactions would be here in New Jersey. The witnesses  
2 that they would have for their part would either come out of  
3 Massachusetts or New Jersey. I'm not sure of who the  
4 people -- who worked on it. They came to their offices. The  
5 equipment that they purchased was through New Jersey and so  
6 everything is here in New Jersey. So to make everybody go to  
7 California wouldn't be, one, convenient and wouldn't be, I  
8 think, proper in that sense.

9 I understand that they wrote the contract. It  
10 shouldn't be held against them with regard to it. As I said,  
11 it's not convenient for us to bring the case in California  
12 because of that. We think that there should be some redress  
13 with regard to it. We were happy to conference, but there's  
14 nobody that was considering conferencing, so I filed the suit  
15 after all the e-mails went back and forth between the parties.

16 THE COURT: Okay.

17 Anything further?

18 MR. ROBBINS: We are seeking a simple resolution.  
19 They haven't done anything. They checked with regard to it.  
20 We're out the money. We can't use the system. We wanted to  
21 get back to whatever it is for the equipment and we didn't get  
22 anything for it. But this was based upon representations that  
23 they made to Mr. Mayo and Miss Bantassel that they could do  
24 all these different things and they couldn't even do the minor  
25 things which QuickBooks could do. So we need to figure out a

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1 forum in which to do it, and we think we're entitled to do  
2 that. We think it should be in New Jersey, be it in federal  
3 court. We're happy to do whatever it is, but we want that  
4 opportunity.

5 THE COURT: Okay. Thank you.  
6 Counsel.

7 MR. FRIEDMAN: Yes. Thank you, Your Honor.  
8 Just a few factual responses. There have been invoices  
9 that are unpaid and outstanding, in response to Your Honor's  
10 questions, in the amount of 81,310.15. There are also  
11 invoices that are -- that are unbilled, but due, of  
12 206,991.27.

13 THE COURT: Was there acceleration clause in the --

14 MR. FRIEDMAN: There's no acceleration clause, but  
15 there's no termination clause for convenience either. So once  
16 those are billed, those will be due as well.

17 But there is an outstanding amount of over \$81,000.

18 What this comes down to, and without -- I don't think  
19 it's that relevant at this point for this part of the -- of  
20 today to get into the facts. But this is about a vendor  
21 prepayment application. What was provided pursuant to all of  
22 the discussions, pursuant to the contract, and pursuant to the  
23 estimation, was a whole suite of products for their ERP for  
24 three different businesses.

25 Once it was provided, there was a supplemental request

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1 for a vendor prepayment, for whatever reason, which is a  
2 completely separate application.

3       Once that happened in the August/September of 2017 time  
4 period, the folks from Oracle said, sure, we will add that.  
5 And they started discussions with the Beauty Reactions folks  
6 to demo it, to provide it, to -- to correct whatever issues  
7 with respect to their requirements. This was not discussed,  
8 at least in our view, and I know that might be disputed at any  
9 point. I take issue with the fact that there was -- there was  
10 no communication. There was communication from the Oracle  
11 folks from September through December of 2017 trying to demo,  
12 trying to say, hey, do you guys want this new application,  
13 this vendor prepayment so that we can meet your needs? There  
14 was no response. They just wanted -- there was, frankly, no  
15 response on the other end.

16       So I started -- your initial question for me, Your  
17 Honor, was with respect to the mediation requirement. And I  
18 believe Mr. Robbins was trying to address that by saying that  
19 it was, I guess, futile because we had ignored them. And that  
20 just isn't the case. You know, more important for Your  
21 Honor's decision here is there's nothing in the record with  
22 respect to that not being the case.

23       But I just wanted to correct the record that there was  
24 an effort made, a substantial effort by the Oracle folks to --  
25 to provide this additional program that would have solved what

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1 our perceived -- what Oracle's perceived issues are.

2 With respect to the transfer motion, as Your Honor  
3 knows, both the Supreme Court and the Third Circuit have  
4 mandated that when commercial parties such as this,  
5 sophisticated commercial parties sign a contract, unless  
6 there's something highly unusual, the burden is on the person  
7 who is trying to get out of the contract to demonstrate  
8 unconscionability. They should be enforced as a matter of  
9 course. There's a high presumption that they should be  
10 enforced as a matter of course. And here, not only do we have  
11 no evidence with respect to unconscionability, we have quite  
12 the opposite. We have a party who negotiated a commercial  
13 contract who is a sophisticated company led by sophisticated  
14 individuals. In the certification from Mr. Mayo, he says, I  
15 have three businesses. I have other businesses. This was  
16 supposed to integrate all of my businesses.

17 He goes beyond that and says, I actually did what would  
18 be akin to a request for proposal process. He interviewed  
19 several different providers and vendors. He then did a  
20 selection process. The company went through a selection and  
21 chose. The fact that he didn't have counsel, I mean, this is  
22 a very short document. This is actually not in the Terms of  
23 Service with respect to the venue selection. This is in the  
24 actual contract signed by Mr. Mayo, which is only a few pages,  
25 and it's mandatory to -- it's mandatory with respect to both



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1 venue and jurisdiction in California. There's absolutely no  
2 basis in the record and there's no basis under both Supreme  
3 Court precedent and Third Circuit precedent to just simply  
4 ignore the contractual obligation, the contractual agreement  
5 that was struck by the parties, two commercial entities.

6 THE COURT: Okay. Sir, anything further?

7 MR. ROBBINS: Yes, Your Honor.

8 I'm not aware of -- I'm not aware of any other billing  
9 with regard to what has been done. The representations were  
10 after Mr. Mayo has a number of companies with regard to it.  
11 He is not fully understandable of the programs and the  
12 software with regard to it. He has people in his office that  
13 run it.

14 Representations were made. He told them what he needed  
15 to get done, and the simple basic things couldn't even be  
16 done.

17 The suggestion that, well, wait a minute. We can make  
18 more things. It's going to cost you a lot more money and  
19 we're not sure whether it will work, since the basic stuff  
20 didn't even work, that's when the issues came about. There  
21 isn't any further correspondence after I think a three or four  
22 month period of time and nothing was being done. I'm not  
23 aware of further invoices that have been presented with regard  
24 to it. Nothing was said that they were going to come in.  
25 Nothing was said, hey, you owe us money. Nothing has been

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1 said with regard to any of the things.

2 So we disagree with that. And it wasn't such a simple  
3 contract because there's all these different programs that  
4 have a difficult time understanding.

5 THE COURT: Okay. Thank you.

6 Anything further?

7 MR. FRIEDMAN: No, Your Honor. Thank you.

8 THE COURT: Initially, let me thank both counsel for  
9 their very thorough, well thought out argument, as well as the  
10 papers and certifications submitted in support of and in  
11 opposition to this application.

12 The Court will incorporate its prior statement of facts  
13 and jurisdiction set forth on the record a few moments ago.

14 The law is clear, as a matter of fact as recently as  
15 August 7th, 2018, in *Reading Health Care Systems versus Bear*  
16 *Stearns*, Docket No. 16-4234. The Third Circuit Court of  
17 Appeals reiterated the fact that the district court, if  
18 granted much leeway in issues regarding forum non conveniens  
19 dismissals, transfer because they are non-merits issues and  
20 does not entail the assumption by the court of substantive  
21 lawmaking decision power. The Court will, therefore, exercise  
22 its discretion and address first the issue of the contract and  
23 the dispute resolution clause.

24 Just to make the record complete, for purposes of a  
25 motion to dismiss, the Court must accept the factual

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1 allegations in the complaint as true and draw all inferences  
2 in the light most favorable to plaintiffs. *Phillips v. City*  
3 *of Allegheny*, 515 F.3d 224 at 228, 3d Cir. 2008. In deciding  
4 a motion to dismiss pursuant to 12(b)(6), a district court is  
5 required to accept as true all factual allegations in the  
6 complaint and draw all inferences in the facts in the light  
7 most favorable to the plaintiff. Again, *Phillips*.

8 A complaint attacked by a motion to dismiss does not  
9 need detailed factual allegations. *Bell Atlantic v. Twombly*,  
10 550 U.S. 544, 555. However, plaintiff's obligation is to  
11 provide grounds of his entitlement to relief requires more  
12 than labels and conclusions, and a recitation of the elements  
13 of the cause of action will not due. That's *Twombly* quoting  
14 *Papasan*, P-A-P-A-S-A-N, v. *Allain*, A-L-L-A-I-N, 478 U.S. 265.

15 A court is not bound to accept as true legal  
16 conclusions couched as factual allegations. *Papasan* at 286.  
17 Instead, assuming the factual allegations in the complaint are  
18 true, factual allegations must be enough to raise a right to  
19 relief above the speculative level. *Twombly* at 555.

20 Nonetheless, at issue is the TOS which contains a  
21 dispute resolution clause which reads, in relevant part, as  
22 follows: Quote, "Each party agrees that before it seeks  
23 mediation, arbitration, or any form of legal relief, it shall  
24 provide written notice to the other specific issues in dispute  
25 (in referencing the specific portions of any contract between

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1 the parties which are allegedly being breached.)

2 "Within 30 days of such knowledge, knowledgeable  
3 executives of the parties shall hold at least one meeting (in  
4 person or by video or teleconference) for the purposes of  
5 attempting in good faith to resolve the dispute." It goes on,  
6 "Any and all disputes, claims, or controversies arising out of  
7 or relating to this agreement shall be submitted to JAMS for  
8 mediation before arbitration, or any other form of legal  
9 relief may be disputed. The mediation shall take place in  
10 either San Francisco or Santa Clara County, California."

11 Defendant further contends this Court should dismiss  
12 this action based on plaintiff's failure to abide by Section  
13 215 of the TOS entitled Dispute Resolution which, again,  
14 requires that before a party seeking any form of legal relief,  
15 there must, 1, be written notice to the other parties  
16 regarding the specific issues in dispute.

17 2. The parties must hold a meeting to attempt to  
18 resolve the dispute.

19 3. Any disputes, claims, or controversies arising out  
20 of or relating to the agreement shall be submitted to JAMS for  
21 mediation before arbitration or any other form of legal relief  
22 may be instituted.

23 The TOS repeatedly uses the words "must" and "shall,"  
24 which by their plain meaning indicate these steps are  
25 mandatory pre-litigation requirements.

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1           As defendant argues, and the Court is well aware, these  
2 clauses have been enforced in prior cases. Specifically, in  
3 this district, *Chisso, C-H-I-S-S-O, American, Inc. v. M/V*  
4 *Hanjin Osaka, O-S-A-K-A*, 307 F. Supp. 2d 621. Quote, "When a  
5 contract uses the word "shall," courts have repeatedly found  
6 such language to be mandatory." *Vogt-Nem Inc. v. M/V Tramper*,  
7 from North Carolina, 2002, explaining that the use of "will"  
8 and "shall" and "must" all indicate the contract language is  
9 mandatory.

10           In this case, the parties entered into a contract,  
11 sophisticated business people, plaintiff running successful  
12 businesses set forth a cadre of requests for various vendors,  
13 met with vendors, ultimately determined that defendants were  
14 acceptable. These meetings occurred at arm's length and  
15 courts have recognized where the parties' agreement requires  
16 mediation as a condition precedent to litigation, the  
17 complaint must be dismissed and have not hesitated to dismiss  
18 complaints on such grounds. *3-J Hospital No.*  
19 *09-61077-CIV-MARRA*, 2009 Westlaw 3586830. Quote: "Where the  
20 parties' agreement requires mediation as a condition precedent  
21 to arbitration or litigation, the complaint must be  
22 dismissed." *Mortimer v. First Mount Vernon Industries*, citing  
23 the same. *Bronson v. Dry Cleaning Station, Inc.* Quote:  
24 "Failure to mediate a dispute pursuant to a contract requires  
25 the complaint to be dismissed." Noncontractual claims may be

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1 subject to mediation and arbitration provisions.

2 This contract makes mediation a condition precedent to  
3 filing the lawsuit. Accordingly, the parties entered into  
4 this agreement. The parties entered into this agreement at  
5 arm's length. The contract is clear and unambiguous.

6 Accordingly, in light of the overwhelming precedent, the  
7 defendant's motion to dismiss with prejudice for failure by  
8 plaintiff to abide by contractual provisions is granted in  
9 part. Specifically, the motion is granted, and the complaint  
10 is dismissed without prejudice. The plaintiff is directed to  
11 abide by the terms of the TOS, as written and as agreed to by  
12 and between the parties. The Court hopes the parties try to  
13 resolve the issues prior to beginning either litigation or the  
14 arbitration process.

15 Furthermore, notwithstanding the clear language of the  
16 contract, the Court hopes the defendant will be more amenable  
17 to accommodating plaintiff's residency, understanding that  
18 everyone is here that participated in the negotiations and the  
19 contract, but that is not a directive nor is it an order of  
20 the court in light of the clear language of the contract.

21 In light of this ruling, the Court need not address the  
22 alternate grounds for relief, which will be denied without  
23 prejudice as moot. However, I will comment that forum  
24 selection clauses such as the one in the agreement have been  
25 enforced in this district and in this circuit. Quote: "In

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1 the Third Circuit, forum selection clauses are presumptively  
2 valid." *M/S Breman v. Zapata Off-Shore Company*, 407 U.S.1  
3 (1972). Forum selection clauses are presumptively valid.  
4 *Innovative Technologies Distributors, L.L.C. v. Oracle*. A  
5 decision from 2011 by then-judge now Chief Judge Linares,  
6 stating the same and granting Oracle's motion to transfer  
7 pursuant to 28 U.S.C. 1404 (a) to the Northern District of  
8 California based in substantial part on the enforceability of  
9 a forum selection clause.

10 For those reasons, the motion is granted. The parties  
11 will meet, try to mediate this matter prior to the instituting  
12 of any lawsuit, and I have signed the appropriate order.

13 Anything further?

14 MR. FRIEDMAN: No, Your Honor.

15 THE COURT: Anything further?

16 MR. ROBBINS: No.

17 THE COURT: Okay. Good luck.

18 THE DEPUTY COURT CLERK: All rise.

19 (Court concludes at 10:53 a.m.)  
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**REPORTER'S CERTIFICATE.**

I, **Megan McKay-Soule, RMR, CRR**, Official Court Reporter of the United States District Court for the District of New Jersey, do hereby certify that the foregoing proceedings are a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

/S/ Megan McKay-Soule, RMR, CRR      August 30, 2018

Court Reporter

Date



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